



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2004

Mr. Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
P. O. Box 12927
Austin, Texas 78711-2927

OR2004-8176

Dear Mr. Seidenberg:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 209859.

The Texas State Library and Archives Commission (the "commission") received a request for information in the records of former Governor George W. Bush relating to clemency consideration for Claude Howard Jones. You state that some of the requested information has been made available to the requestor. You have submitted the remaining requested information to this office for review. You claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. At the request of the Office of the Governor (the "governor"), you also raise sections 552.107 and 552.111 of the Government Code, but take no position as to the applicability of these exceptions. The governor contends that sections 552.101, 552.107, and 552.111 except some of the submitted information from disclosure. We have considered the exceptions raised and reviewed the submitted information.

The governor claims that Exhibits A, B, and C are excepted from disclosure under section 552.107. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a

governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The governor explains that Exhibits A, B and C were prepared by legal counsel for the former governor and constitute communications made in furtherance of the rendition of legal services to the former governor. Both the governor and the commission indicate that the confidentiality of these documents has been maintained. Accordingly, we conclude that Exhibits A, B, and C may be withheld from disclosure under section 552.107(1) of the Government Code.¹

The commission claims that Exhibits D through L are excepted from disclosure under section 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes such as section 508.313 of the Government Code, which provides in part:

¹Because we reach this conclusion, we need not address the governor’s claim that Exhibits A, B and C are also excepted from disclosure under sections 552.101 and 552.111 of the Government Code.

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the Texas Department of Criminal Justice] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

(b) Statistical and general information relating to the parole and mandatory supervision system, including the names of releasees and data recorded relating to parole and mandatory supervision services, is not confidential or privileged and must be made available for public inspection at any reasonable time.

(c) The [Texas Department of Criminal Justice] may provide information that is confidential and privileged under Subsection (a) to:

(1) the governor;

(2) a member of the [B]oard [of Pardons and Paroles];

(3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

Gov't Code § 508.313(a)-(c). Section 508.313 requires the Texas Department of Criminal Justice (the "department") to transfer information to the governor for consideration in clemency matters; such a transfer does not affect the confidentiality of the information. *See* Gov't Code § 508.313(c). Based on the commission's representations and our review of the documents at issue, we find that the commission has established that the department transferred Exhibits D through L to the former governor for his consideration in a clemency matter. Accordingly, we determine that Exhibits D through L are confidential pursuant to section 508.313 of the Government Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code.

In summary, Exhibits A, B and C are protected by the attorney-client privilege and may be withheld from disclosure under section 552.107(1) of the Government Code. Exhibits D through L are confidential under section 508.313 of the Government Code and thus must be withheld from disclosure under section 552.101 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Karen Hattaway".

Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/krl

Ref: ID# 209859

Enc. Submitted documents

c: Mr. Reid Pillifant
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(w/o enclosures)

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